

DISTRICT OF MAINE

Respondent

I. Background

On December 12, 1997 the Maine Superior Court (Androscoggin County) adjudged the petitioner guilty (per an earlier guilty plea) of five counts of trafficking in Schedule W drugs, Class B, in violation of 17-A M.R.S.A. § 1103. Judgment. The court sentenced the petitioner to concurrent terms of eight years in prison, with all but three years suspended as to each count, and a term of four years' probation. *Id.* The petitioner filed both a direct appeal of the judgment and a motion for leave to appeal his sentence. Docket, *State v. Barnes*, Criminal No. 97-608 (Me. Super. Ct.) ("Docket"), filed with Response, at 2 (entries of Jan. 2, 1998).

The petitioner also moved to correct his sentence pursuant to Me. R. Crim. P. 35(a) on the basis that the court had failed to inform him that deportation would be a collateral consequence of a judgment against him, tainting the manner in which sentence was imposed. *See* Transcript of Hearing on Motion To Withdraw Motion for Correction of Sentence, *State v. Barnes*, Criminal No. 97-608 (Me. Super. Ct. May 6, 1998), attached to Letter dated September 17, 2000 from Telbert Barnes (Docket No. 14), at 5-6. The court denied the motion, ruling that it set forth no grounds for relief in sentencing. *Id.* at 6.

On or about June 24, 1998 the petitioner voluntarily dismissed his direct appeal as improvidently taken inasmuch as his claims were based on ineffective assistance of counsel and thus not cognizable in that venue. Docket at 3 (entry of July 1, 1998). Permission to appeal sentence also was denied. *See* Petition for Post-Conviction Review ("State PCR Petition"), *Barnes v. State*, Criminal No. 98-307 (Me. Super. Ct.), filed with Response, at 1.

On June 22, 1998 the petitioner filed a petition for state post-conviction review on two grounds: (i) that "[d]uring my Rule 11 proceeding the court did not inform me that, as a Jamaican national, I was subject to deportation upon conviction for these felony offenses" and (ii) that "[m]y

court-appointed attorney . . . never informed me, prior to my Rule 11 proceeding, that as a Jamaican national, I was subject to deportation upon conviction for these felony offenses.” State PCR Petition at 3. The petitioner abandoned the first of these grounds for relief, and the Superior Court on March 15, 2000 ruled against him as to the second. *See generally* Order on Petition for Post-Conviction Relief, *Barnes v. State*, Criminal No. 98-307 (Me. Super. Ct. March 15, 2000) (“State PCR Order”), filed with Response.

In so ruling, the court observed that the parties had stipulated *inter alia* that the petitioner, who has a Jamaican accent, was a citizen of Jamaica and a legal permanent resident of the United States, that defense counsel assumed the petitioner was of Jamaican heritage, that the petitioner did not ask counsel to check the effect his pleas would have on his immigration status and that counsel never ascertained or apprised the petitioner of that effect. *Id.* at 1-2. The court also accepted that the petitioner would testify that if he had been aware of these consequences, he would not have pled guilty and would have insisted on going to trial. *Id.* However, applying the so-called “collateral consequences” doctrine, the court found that defense counsel’s representation did not fall below the standards of an ordinary, fallible attorney and thus did not constitute ineffective assistance of counsel:

Simply stated, the collateral consequences doctrine holds that a defendant’s constitutional rights are not violated by a failure of defense counsel or the court to advise the defendant at the time of plea of consequences of that plea beyond the sentence itself, if those consequences are deemed “collateral.” Our Law Court has addressed the applicability of this doctrine with regard to information given by the court, but has not to date dealt with the question of whether deportation comes within the collateral consequences doctrine. Courts in other jurisdictions have split on this issue, but the majority has concluded that counsel is not ineffective for having failed to advise the client about deportation. This court concludes that if directly confronted with the issue, particularly as presented on the facts of the present case, our Law Court would side with the majority of other jurisdictions and find no duty on the part of an ordinary fallible attorney to ferret out and explain deportation consequences to the defendant contemplating a plea.

Id. at 4 (citations omitted).

The petitioner appealed this decision to the Law Court, which on June 13, 2000 issued an order denying a certificate of probable cause. Order Denying Certificate of Probable Cause, *Barnes v. State*, Docket No. And-00-193 (Me. June 13, 2000), filed with Response. He initiated the instant action on July 25, 2000. *See* Motion Under 28 USC § 2255 To Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody [sic] (Docket No. 1) at 1; [Motion] for Writ of Error Coram Nobis Pursuant to 28 U.S.C. 2255 (“Coram Nobis Motion”) (Docket No. 2) at 1.¹

II. Discussion

The petitioner seeks relief pursuant to 28 U.S.C. § 2254 on four grounds, all implicating ineffective assistance of counsel. Petition at 5-6. Specifically, he asserts that defense counsel failed to: (i) advise him of the effect of the guilty plea on his immigration status, (ii) investigate those consequences despite being put on notice that the petitioner was Jamaican, (iii) challenge the legality of the petitioner’s arrest on the basis of violation of his right to notification of his consulate pursuant to the Vienna Convention, and (iv) move to suppress evidence on the basis that packaging (plastic) was included in drug weight. *Id.*

The State seeks dismissal of the Petition on the basis that the first two grounds do not entitle the petitioner to relief on the merits, while the latter two were waived by failure to assert them on state post-conviction review. *See generally* Response.

Pursuant to 28 U.S.C. § 2254(d):

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim **C**

¹ The petitioner was ordered *inter alia* to refile his petition on the proper form, Order (Docket No. 5), which he did on August 9, 2000, Petition at 1.

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Construing this section of the statute, the First Circuit has held that “the [habeas] writ cannot issue unless the state court decision contravenes, or involves an unreasonable application of, extant Supreme Court jurisprudence.” *O’Brien v. DuBois*, 145 F.3d 16, 20 (1st Cir. 1998) (footnote omitted).

The decision of the Maine Superior Court applying the collateral-consequences doctrine to the petitioner’s claim of ineffective assistance of counsel does not contravene clearly established federal law. To the contrary, it fully comports with recent First Circuit caselaw affirming prior holdings that application of the collateral-consequences doctrine “bar[s] any ineffective assistance claims based on an attorney’s failure to advise a client of his plea’s immigration consequences.” *United States v. Gonzalez*, 202 F.3d 20, 28 (1st Cir. 2000). Inasmuch as an attorney does not render ineffective assistance in failing to warn of such collateral consequences, it follows that he or she cannot render ineffective assistance in failing to investigate whether such a warning is necessary.

The argument of the State as to the petitioner’s final two grounds for relief — waiver — is in essence an argument that the federal court is precluded from reaching the merits of claims procedurally defaulted at the state level.

As the Supreme Court has made clear, “[i]n all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and

actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.” *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). A claim of “fundamental miscarriage of justice,” in turn, requires a showing “that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.” *Schlup v. Delo*, 513 U.S. 298, 327 (1995).

The petitioner acknowledges that he has not raised his third ground for relief (implicating the Vienna Convention) in any state proceeding. Petitioner’s Response to State’s Answer to Petition for Writ of Habeas Corpus (“Reply”) (Docket No. 16) at 3. He asserts that he could not have done so because he only recently came to understand that he was entitled to such rights. *Id.* The petitioner was represented by counsel during his state post-conviction review proceedings. *See* Petition at 7. Any error or omission on the part of counsel in that context could not constitute “cause.” *See, e.g., Ortiz v. Stewart*, 149 F.3d 923, 932 (9th Cir. 1998) (“While ineffective assistance can constitute ‘cause’ for procedural default, it will only constitute cause if it amounts to an independent constitutional violation.

Because there is no constitutional right to an attorney in a state or federal habeas proceeding, it follows that there can be no deprivation of effective assistance in such proceedings.”) (citations omitted); *Pitsonbarger v. Gramley*, 141 F.3d 728, 737 (7th Cir. 1998) (same); *Pollard v. Delo*, 28 F.3d 887, 888 (8th Cir. 1994) (same).² Nor does the petitioner argue, or the record contain any evidence tending to establish, his actual innocence of the drug-trafficking crimes in issue.³

² Nor, had the petitioner been proceeding *pro se*, would his own ignorance of the law constitute “cause.” *See, e.g., Rodriguez v. Maynard*, 948 F.2d 684, 688 (10th Cir.1991) (section 2255 petitioner’s *pro se* status and lack of awareness and training in the law not “cause” for purposes of cause-and-prejudice test); *Hughes v. Idaho State Bd. of Corr.*, 800 F.2d 905, 914 (9th Cir. 1986) (section 2254 petitioner’s illiteracy, loss of legal assistance not “cause” for purposes of cause-and-prejudice test).

³ The State does not argue that the petitioner, in failing to raise the Vienna Convention claim at all at the state level, failed to exhaust his remedies. *See generally* Response. A section 2254 petitioner fails to exhaust state remedies if, with respect to a particular federal (continued on next page)

The petitioner asserts that his final ground for relief (implicating packaging weight) has not been procedurally defaulted inasmuch as he did raise it in the context of his Rule 35 motion. *See* Reply at 1. To prove this point, he moves for production of his Rule 35 records. Motion Requesting the Ordering of Records (Docket No. 15). No such production is necessary (and the motion is therefore denied) in that, even assuming *arguendo* that such a claim was raised, the petitioner admits that he failed to appeal the Superior Court’s denial of the motion. *See* Petition at 4. Such an omission constitutes a procedural default. *See Domaingue v. Butterworth*, 641 F.2d 8, 14 (1st Cir. 1981) (noting that if new habeas petition were filed, district court could entertain argument that state procedural defaults, including failure to timely appeal denial of new trial motion, precluded court from hearing claim). The only explanation offered by the petitioner for his failure to appeal the denial of the Rule 35 motion is that he was advised by both the Superior Court and the Law Court that his claims should be pursued on state post-conviction review. *See* Petition at 4. However, he inexplicably did not raise the packaging-weight argument in his State PCR Petition. He demonstrates neither cause and prejudice, nor actual innocence, sufficient to excuse his procedural default with respect to the packaging-weight claim.⁴

III. Conclusion

claim, “he has the right under the law of the State to raise, by any available procedure, the question presented.” 28 U.S.C. § 2254(c); *see also Carsetti v. Maine*, 932 F.2d 1007, 1011 (1st Cir. 1991) (“Without an available remedy in state court, petitioner has . . . satisfied the exhaustion requirement”). Inasmuch as appears, the petitioner’s failure to include the Vienna Convention claim in his State PCR Petition would preclude him from raising it at the state level at this time. *See McEachern v. State*, 676 A.2d 488, 489 (Me. 1996) (“[A]ny error not raised in a prior post-conviction petition is deemed to be waived ‘unless the State or Federal Constitution otherwise require or unless the court determines that the ground could not reasonably have been raised in an earlier action.’”) (quoting 15 M.R.S.A. § 2128(3)).

⁴ The petitioner also complains that the State ignored his Coram Nobis Motion, in violation of the court’s Order to Answer. Reply at 3; *see also* Order To Answer (Docket No. 9). Any such error was harmless, inasmuch as nothing presented in the petitioner’s Coram Nobis Motion is outcome-dispositive.

For the foregoing reasons, I recommend that the petitioner's habeas corpus petition be **DENIED** without an evidentiary hearing.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 30th day of November, 2000.

David M. Cohen
United States Magistrate Judge

ADMIN

U.S. District Court
District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 00-CV-218

BARNES v. MAINE, STATE OF
Assigned to: JUDGE GENE CARTER

Filed: 07/25/00

Referred to: MAG. JUDGE DAVID M. COHEN

Demand: \$0,000

Nature of Suit: 530

Lead Docket: None

Jurisdiction: US Defendant

Dkt# in other court: None

Cause: 28:2254 Petition for Writ of Habeas Corpus (State)

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